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NO. 03-1261

IN THE SUPREME COURT OF THE UNITED STATES

ROCHELLE BROSSEAU, A CITY OF PUYALLUP, WASHINGTON, POLICE OFFICER

Petitioner,

v.

KENNETH J. HAUGEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICI CURIAE BRIEF OF THE STATES OF WASHINGTON, ALABAMA, ALASKA, ARIZONA, DELAWARE, HAWAII, MARYLAND, MICHIGAN, NEBRASKA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS AND WYOMING IN SUPPORT OF PETITIONER

CHRISTINE O. GREGOIRE
Attorney General

Talis Abolins*
Catherine Hendricks
Assistant Attorneys General

629 Woodland Square Lp. SE
P. O. Box 40126
Olympia, WA 98504-0126
(360) 459-6600
**Counsel of Record*

ALABAMA

Troy King
Attorney General
State of Alabama
Office of the
Attorney General
11 South Union Street
Montgomery, AL 36130

Phone: 334/ 242-7300

ALASKA

Gregg D. Renkes
Attorney General
State of Alaska
Office of the
Attorney General
P.O. Box 110300
Juneau, AK 99811-0300
Phone: 907/ 465-3600

ARIZONA

Terry Goddard
Attorney General
State of Arizona
Office of the
Attorney General
1275 W. Washington St.
Phoenix, AZ 85007-2926
Phone: 602/ 542-4266

DELAWARE

M. Jane Brady
Attorney General
State of Delaware
Office of the
Attorney General
820 N. French Street
Wilmington, DE 19801
Phone: 302/ 577-8400

HAWAII

Mark J. Bennett
Attorney General
State of Hawaii
Office of the
Attorney General
425 Queen Street
Honolulu, HI 96813
Phone: 808/ 586-1282

MARYLAND

J. Joseph Curran, Jr.
Attorney General
State of Maryland
Office of the
Attorney General
200 Saint Paul Place
Baltimore, MD 21202
Phone: 410/ 576-6300

MICHIGAN

Michael A. Cox
Attorney General
State of Michigan
Office of the
Attorney General
P.O. Box 30212
525 W. Ottawa Street
Lansing, MI 48909-0212

Phone: 517/ 373-1110

NEBRASKA

Jon Bruning
Attorney General
State of Nebraska
Office of the
Attorney General
P.O. Box 98920
Lincoln, NE 68509-8920

Phone: 402/ 471-2682

OHIO

Jim Petro
Attorney General
State of Ohio
Office of the
Attorney General
30 E. Broad St., 17th Flr.
Columbus, OH 43215

Phone: 614/ 466-4320

OKLAHOMA

W.A. Drew Edmondson
Attorney General
State of Oklahoma
Office of the
Attorney General
2300 N. Lincoln Blvd.,
Oklahoma City, OK
73105

Phone: 405/ 521-3921

OREGON

Hardy Myers
Attorney General
State of Oregon
Office of the
Attorney General
1162 Court St. N.E.
Salem, OR 97301
Phone: 503/ 378-6002

SOUTH CAROLINA

Henry McMaster
Attorney General
State of South Carolina
Office of the
Attorney General
P.O. Box 11549
Columbia, SC 29211
Phone: 803/ 734-3970

SOUTH DAKOTA

Lawrence E. Long
Attorney General
State of South Dakota
Office of the
Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070

Phone: 605/ 733-3215

TEXAS

Greg Abbott
Attorney General
State of Texas
Office of the
Attorney General
P.O. Box 12548
Austin, TX 78711-2548

Phone: 703/ 868-9068

WYOMING

Patrick J. Crank
Attorney General
State of Wyoming
Office of the
Attorney General
123 State Capitol Bldg.
Cheyenne, WY 82002

Phone: 307/ 777-7841

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INTEREST OF THE AMICI CURIAE

This brief is filed pursuant to Supreme Court Rule 37.5, on behalf of the State of Washington and the other signature states (the Amici States) through their attorneys general, in support of the Petitioner Rochelle Brosseau, who is a police officer for the City of Puyallup. The Amici States have a paramount interest in preserving police officers' ability to make difficult split-second decisions to protect the public from an imminent threat of serious bodily injury and death, without fear of the expanded exposure to civil rights liability created by the Ninth Circuit.

The Ninth Circuit's decision undermines public safety by holding that Officer Brosseau could not lawfully use her weapon to protect the public from the escalating and inherently dangerous situation created by Respondent Kenneth Haugen and his vehicle. The need for review is all the more compelling given the Ninth Circuit's determination that Officer Brosseau is not even entitled to qualified immunity. Officer Brosseau exercised her discretion in a manner reasonably perceived as necessary to protect the citizens of her community from a suspect who obviously had no regard for his own life, or the lives of others. This is precisely the type of discretionary scenario for which state officers are entitled to qualified immunity.

ARGUMENT

The Petitioner has already addressed the conflict among the circuits presented by the Ninth Circuit's decision. The Amici States agree, and will not repeat the Petitioner's argument. Instead, the Amici States will explain why this Court's review is also warranted by: (1) the Ninth Circuit's substantial departure from this Court's standard for evaluating reasonable force under the Fourth Amendment; and (2) the need to clarify what constitutes clearly established law for police officers confronted with the difficult split-second decision of whether to use deadly force to stop a fleeing felon.

A. The Ninth Circuit's Decision Misapplies This Court's Standard Allowing Police To Use Deadly Force When Reasonably Necessary To Protect The Public

The Ninth Circuit's decision misapplied this Court's decision in *Tennessee v. Garner*, 471 U.S. 1 (1985), which announced the standard for determining whether a "seizure" through the use of deadly force is reasonable under the Fourth Amendment. In evaluating claims of "unreasonable seizure" due to excessive force, this Court has emphasized the need to carefully balance the interests of the individual suspect against the countervailing interests of society. *See id.* at 8 (this balancing of competing interests is "the key principle of the Fourth Amendment") (citations omitted).

With respect to deadly force, this Court has determined that society's interests outweigh the interest of the individual when an officer reasonably believes there is probable cause that the suspect presents a significant risk of serious bodily injury to

the officer, or to others. *Id.* at 11. When this threshold probable cause standard is met, the officer's use of force is "objectively reasonable", and not excessive for purposes of the Fourth Amendment. *See Graham v. Conner*, 490 U.S. 386, 397 (1989).

The evaluation of objective reasonableness under the Fourth Amendment must be undertaken not from the perspective of 20/20 hindsight possessed by a judge in chambers, but from the "on scene perspective" of the officer who must make a split-second decision based on the limited facts and circumstances of the tense, uncertain, dangerous, and rapidly-evolving scenario with which she is confronted.[1] *Graham*, 490 U.S. at 396-97 (1989); *see Saucier v. Katz*, 533 U.S. 194, 205 (2001).

In *Saucier*, this Court reiterated the importance of the officer's "on scene perspective" and also emphasized that the officer's split-second judgment must be evaluated from the officer's "temporal perspective" of "reasonableness at the moment". *Saucier*, 533 U.S. at 206. This is a fact-dependent inquiry from the perspective of the reasonable officer on the scene and at the moment, rather than the 20/20 vision of hindsight after all the facts are gathered.

In this case the Ninth Circuit's analysis unavoidably collides with this Court's standard for

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[1] This Court requires "careful attention to the facts and circumstances of each particular case", including: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. *Saucier*, 533 U.S. at 205 (citation omitted).

evaluating objective reasonableness under the Fourth Amendment. The Ninth Circuit's standard dramatically increases the exposure of law enforcement officers to civil rights claims by: (1) abandoning the proper "on scene perspective", and imputing the officer with knowledge of all facts viewed from all perspectives; and (2) abandoning the proper "temporal perspective", and imputing the officer with after-acquired knowledge not known at the moment of decision.

1. The Ninth Circuit Replaced The "On Scene Perspective" Of The Officer, With A "Combined Perspective" Of All Persons At The Scene

The Ninth Circuit's decision runs afoul of this Court's admonition in *Garner* and *Graham* that the reasonableness of an officer's actions must be evaluated from the standpoint of the officer's "on scene perspective" – considering the facts and circumstances known to the officer at the moment of decision. The Ninth Circuit disregarded the focus of this inquiry, and instead imputed Officer Brosseau with the knowledge of other persons on the scene, even though there was no evidence that she was aware of those facts.

Applying this erroneous "total scene perspective", the Ninth Circuit improperly judged Brosseau from a standard of omniscience, faulting her for failing to act in light of many facts of which she was not aware. For example, the Ninth Circuit faults Brosseau and finds her actions unreasonable because she did not know that: (1) from the perspective of a bystander, the other responding officers who could be struck by Haugen's fleeing vehicle were actually in another yard and not in

harm's way (Pet. App. 31)[2]; (2) from the perspective of bystanders, Haugen was not a dangerously violent aggressor in the altercation for which Brosseau had been summoned (Pet. App. 39)[3]; and (3) from the perspective of Haugen in the Cherokee (and of bystanders in other locations), Haugen did not appear to be reaching for a weapon under the seat (Pet. App. 24).

The Ninth Circuit's "total scene perspective" is illogical and troubling, as it imposes liability based on facts and circumstances not within the officer's knowledge. The relevant perspective is the "on scene perspective" of the officer only – not the combined perspectives and knowledge of every witness and suspect on the scene. Nor is the proper perspective the *Matrix*-like perspective of a judge in chambers, who has the luxury of mentally examining the out-of-control split-second event in slow motion from the combined perspectives of surrounding bystanders. Such a perspective works an injustice to the officer, and to the society she is obligated to protect. Such a perspective also conflicts with the "on scene perspective" mandated by this Court.

2. The Ninth Circuit Replaced The "Temporal Perspective" Of Reasonableness At The Moment" With One

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[2] "Atwood, who witnessed the events while seated in Tamburello's pickup, stated that the other two officers were still in the backyard at the time Brosseau fired." Pet. App. 31.

[3] "By all accounts, however, Haugen was on the receiving end of the violence." Pet. App. 39 (citing the accounts of those who, unlike Officer Brosseau, were actually present at the time of the brawl).

That Judges Officer Brosseau Based On Hindsight

In addition to the "on scene perspective", the Ninth Circuit disregarded this Court's admonition that the reasonableness of the officers' actions must not be viewed in 20/20 hindsight. *Saucier*, 533 U.S. at 206; *see also Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (rejecting post hoc evaluations of more reasonable interpretations). The relevant inquiry is into "reasonableness of the moment". *Saucier*, 533 U.S. at 206.

> "Excessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred." *Saucier*, 533 U.S. at 207.

The Ninth Circuit's analysis contravenes this Court's standard of reasonableness of the moment by ignoring the proper temporal perspective, and improperly judging Officer Brosseau based on after-acquired knowledge. For example, the Ninth Circuit found Brosseau's actions unreasonable because: (1) after her decision to fire the shot, Haugen revealed that his bold decision to return to a closely guarded vehicle was not intended to inflict injury on those involved in the altercation – the very persons that Brosseau knew Haugen had cause to be unhappy with (Pet. App. 28); (2) after her decision to fire the shot, Haugen was lucky enough to navigate his reckless getaway by making a "clear, straight shot" through a "small, tight space" (Pet. App. 30, 39); (3) after her decision to fire the shot, Haugen was unable to reach speeds higher than 45 m.p.h., the maximum possible speed in third gear (Pet. App. 16, 39, 50-51)[4]; (4) after her decision to fire the shot, innocent persons or vehicles did not emerge onto the streets, lawns, or sidewalks in the path of Haugen's escaping vehicle (Pet. App. 39); and (5) after her decision to fire the shot, Haugen did not lead police on an out-of-control high-speed chase. See Pet. App. 33.

The Ninth Circuit's 20/20 perspective is inconsistent with this Court's temporal perspective, and raises a host of important problems necessitating review by this Court. The reasonableness of Brosseau's decision is not undermined by the fact that, after her split-second decision to use force, Haugen managed not to collide with other persons or vehicles during his flight from the scene. Unfortunately, officers do not have the luxury of waiting to see if mayhem will actually materialize on a residential street (or in a small, tight space) before deciding how much force may be necessary to prevent that mayhem.

The Ninth Circuit's post hoc reliance on Haugen's successful negotiation of the "tight, small space" is also troubling. An officer's reasonable and discretionary assessment of the dangerousness posed

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[4] The majority inexplicably concludes that Haugen drove away "safely", when there is no dispute Haugen was convicted for driving away with criminal recklessness. And to the extent that the Ninth Circuit considered this residential driving "safe" because it was less than fort-five miles an hour, it was only so because Brosseau shot Haugen. *See* Pet. App. 50-51; Pet. App. 16 (Judge Fletcher noted, "According to Haugen, he never got the Jeep past third gear and never drove faster than forty-five miles per hour."); Pet. App. 39 (Judge Fletcher observed, "Indeed, he [Haugen] was able to drive away safely even after Brosseau shot him.").

by a fleeing vehicle should not be superceded by the escaping suspect's perspective (uncritically adopted by the court) that he has a "clear, straight shot", especially where the allegedly clear shot involves shooting a Jeep Cherokee out of an admittedly "small, tight space" populated by potential victims. Pet. App. 30. The Ninth Circuit accepts Haugen's after-the-fact conclusion that he had a safe and unimpeded escape route without regard to Officer Brosseau's perspective or knowledge of the allegedly "clear, straight shot", and without considering the escalating crisis of the moment.

By trusting in the unknown driving ability of a reckless man whose intention to negotiate the tight spot without causing harm was unknown, the Ninth Circuit's decision fails to consider the big picture, overlooking important and undisputed aspects of the factual setting. Officer Brosseau made her difficult decision against the backdrop of a residential neighborhood on a Sunday afternoon. Add to this the undisputed facts that the vehicle had to maneuver through an area populated by bystanders, occupied vehicles and roaming pedestrian officers. If the Ninth Circuit holds that this setting was not worthy of police protection from a berserker suspect in a Jeep Cherokee, then what about a busy airport concourse, the checkpoint for a governmental facility, or an elementary school parking lot?

This Court's standard in *Garner* does not suggest an exception for felons who manage to make their way into the driver's seat of an automobile, and then perceive an escape route through a maze of vehicles and potential victims. The standard still looks to those facts known, at the moment when

force was used, from the perspective of the officer on the scene.

Ironically, to the extent that hindsight is relevant, it actually confirms the effectiveness of Officer Brosseau's decision to fire a single shot into an individual who, without fatality, was prevented from reaching the escape speeds that all too frequently result in death or serious bodily injury. In this respect hindsight rewards Officer Brosseau with a job that very likely could have prevented death or injury to persons taking advantage of a Sunday afternoon drive or stroll in their residential neighborhood.

Rather than the punishment of civil rights liability, Officer Brosseau should be commended for her selfless bravery in the face of imminent danger to herself, and those residing in the quiet residential neighborhoods of Puyallup, Washington. Officer Brosseau's actions were taken in the course of an evolving situation during which she made every effort to use non-lethal force – verbal commands, wrestling over car keys, breaking a window and injuring herself in the process, and striking the fleeing suspect while giving additional verbal commands. In the midst of this escalating situation, Haugen's only response was his terrifying statement that Brosseau would have to kill him to stop him. As portended by his behavior immediately prior to the shooting, Haugen sped away as fast as he could through the residential neighborhood. Fortunately for those in the vicinity (including adjacent streets and intersections), Brosseau's single shot at the critical moment of Haugen's departure successfully prevented Haugen from achieving speeds higher than what is possible for a red-lining, 3,000-pound

Jeep Cherokee in third gear with the pedal to the floor. Pet. App. 50-51. While these facts are not a part of Officer Brosseau's contemporaneous knowledge, they confirm the effectiveness of a difficult decision to use force that might otherwise have resulted in a community tragedy worse than the wound inflicted on the fleeing felon. This is precisely the type of balancing that *Garner* turns on, and here the facts decisively tip the scales of justice in favor of Officer Brosseau, and her decisive protection of public safety.

3. The Ninth Circuit's Departure From *Garner* Sends The Wrong Message To Officers And Offenders, Raising An Issue Of Substantial Public Importance

Under *Garner*, officers may use deadly force when there is probable cause to believe a suspect presents a threat of serious bodily harm to others. *Garner*, 471 U.S. at 11. This probable cause standard was easily satisfied under the undisputed facts of this case, where a fleeing felon returned to the crowded scene of an altercation and police search, fought his way into a Jeep Cherokee, and unequivocally demonstrated that deadly force was the only way to prevent him from recklessly wielding a 3,000-pound "weapon" to facilitate his escape through a residential community on a Sunday afternoon.

The Ninth Circuit chose to disregard this Court's standard of objective reasonableness, which looks to the "on the scene" and "at the moment" perspective of the police officer. In its place, the Ninth Circuit has created a standard that imputes

the officer with knowledge of facts known by other bystanders, and with facts that did not develop until after deadly force was used. This troubling distortion of Fourth Amendment law and the standard of qualified immunity will interfere with law enforcement within the Ninth Circuit. The Amici States respectfully ask this Court to review this case and reaffirm that *Garner*'s on the scene and at the moment perspective does not cease to apply merely because a felon chooses to flee in a speeding vehicle, rather than on foot.

Under *Garner*, this is not a close case. If allowed to stand, the Ninth Circuit's departure from *Garner* for persons who threaten harm with vehicles will unleash uncertainty and confusion throughout the circuit. The decision will impair law enforcement officers' ability to make the critical decision whether or not to use force reasonably perceived as necessary to apprehend those who unquestionably present a significant risk of death to police officers, innocent individuals in the immediate vicinity, and other community members who may unknowingly emerge onto a street or intersection in the path of an otherwise unstoppable motor vehicle.[5]

The Ninth Circuit's published decision sends the wrong message to police - no matter how dangerous a vehicular flight may be to the lives of

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[5] Haugen ultimately plead guilty to a felony eluding charge, an admission that he drove "his vehicle in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing vehicle". Wash. Rev. Code § 46.61.024. In Washington, the only other driving related offenses that are more serious are Vehicular Assault (Wash. Rev. Code § 46.61.520), and Vehicular Homicide (Wash. Rev. Code § 46.61.522).

officers and others, officers in Brosseau's predicament must necessarily hesitate, if not categorically forego the split-second decision to prevent the serious risk of imminent human carnage that is all too often wrapped up in the wreckage of a high speed vehicular flight.[6] Conversely, the message to the felon is a green light: acts of desperation and reckless escape will be rewarded not with apprehension, but with the unimpeded getaway facilitated by the Ninth Circuit's threat of civil rights liability for those public servants who would otherwise exercise their discretion and responsibility to protect the public from unreasonable risk of serious bodily harm and death.

B. This Court Needs To Clarify The Circumstances Under Which A Constitutional Right Is Clearly Established

Under *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001), and *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), a court determining whether qualified immunity is available, as a matter of law, to a particular law enforcement officer, is required to make a two part inquiry: (1) whether a constitutional right would have been violated on the facts alleged; and (2) whether that right was clearly established at the time of violation, and, consequently, whether it

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[6] Research confirms the substantial risk of harm posed by high speed flight, and that a high percentage of fatalities and injuries occur within the first two minutes. *See* John Hill, *High-Speed Police Pursuits: Dangers, Dynamics, and Risk Reduction*, FBI Law Enforcement Bulletin 14 (July 2002); G.P. Alpert, U.S. Department of Justice, National Institute of Justice, *Pursuit Management Task Force Report* (1998).

would have been clear to a reasonable officer that her conduct was unlawful in the situation she confronted.

The Ninth Circuit's erroneous determination that Officer Brosseau had received fair and clear warning that her use of deadly force in pursuit of a fleeing felon (whom she believed to be poised to use a 3000-pound Jeep as a weapon) would be a violation of his Fourth Amendment rights and, consequently, should be denied qualified immunity under *Saucier* and *Anderson* requires that this Court clarify the circumstances under which a constitutional right is "clearly established".

In *Saucier*, this Court acknowledged that *Graham v. Connor*, 490 U.S. 386 (1989), one of the primary cases relied upon by the Ninth Circuit in determining that Officer Brosseau was not entitled to qualified immunity, "clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness". *Saucier*, 533 U.S. at 201-02. But then this Court went on to emphasize that this "general proposition" is "not enough". *Id.* Quoting *Anderson* and *Wilson v. Layne*, 526 U.S. 603, 615 (1999), this Court concluded: "[A]s we explained in *Anderson*, the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Id.*

Although the Ninth Circuit opinion in *Haugen* pays lip service to the definition of "clearly established" articulated in *Saucier* (*see* Pet. App. 41), the circuit court's determination Officer Brosseau is not entitled to qualified immunity – on on the basis

of a general Fourth Amendment proposition alone – demonstrates that additional clarification of how a court determines whether a right is "clearly established" is required from this Court. In this context, the Ninth Circuit's interpretation of this Court's decisions in *Tennessee v. Garner*, 471 U.S. 1 (1985), *Graham v. Connor*, 490 U.S. 386 (1989), and *Hope v. Pelzer*, 536 U.S. 730 (2002), is particularly problematic.

In *Graham*, 490 U.S. at 388, this Court made the general determination that "a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of his person . . . [is] properly analyzed under the Fourth Amendment's 'objective reasonableness standard', rather than under a substantive due process standard". But the circumstances of *Graham* make it clear that the right established by that case would have provided little assistance to Officer Brosseau in determining whether her conduct was unlawful.

Dethorne Graham, the plaintiff in *Graham*, was a diabetic who rushed out of a convenience store because he was experiencing the onset of an insulin reaction. Officer Connor became suspicious, conducted an investigative stop, ignored Graham's requests for sugar and juice, and, with the assistance of other several officers, brutalized him until he received word from the convenience store that Graham had done nothing wrong. Nothing in *Graham* would have given Officer Brosseau fair warning that her decision to use deadly force against an individual characterized in Judge Gould's dissent as "a visibly disturbed felon willing to do almost anything to avoid capture" was unlawful. Pet. App. 48.

Similarly, in *Garner*, this Court found that the Tennessee statute defining the terms under which deadly force could be used by a police officer[7] was not unconstitutional on its face, but was unconstitutional as applied under the particular circumstances of *Garner*, where the fleeing burglar – a fifteen year old, 5'4", 100 pound eighth grader – did nothing to suggest that he posed a serious threat of physical harm:

> "[Tenn. Code Ann. § 40-7- 108 (1982)] is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Garner*, 471 U.S. at 11.

Wash. Rev. Code § 9A.16.040, is similar to Tenn. Code Ann. § 40-7-108 (1982) in that it provides that the "use of deadly force is justifiable . . . [w]hen necessarily used by a peace officer . . . .[t]o arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony."[8]

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[7] The statute provides that "[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." Tenn. Code Ann. § 40-7- 108 (1982).

[8] At the time *Garner* was decided, Washington was identified in the opinion as one of nineteen states that had codified the common law rule (which allowed the use of whatever force was necessary to effect the arrest of a fleeing felon, though not a misdemeanant). *Garner*, 471 U.S. at 16, n.14.

Washington law also provides: "If after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest." Wash. Rev. Code § 10.31.050.[9]

On the basis of *Garner*, Officer Brosseau could reasonably have believed the Washington deadly force statute, which is not unconstitutional on its face, would not be "constitutionally unreasonable" as applied to prevent Haugen's escape under circumstances dramatically different from *Garner* and where, in accordance with the legal principle articulated in *Garner*, she had "probable cause to believe that the suspect pose[d] a threat of serious physical harm, either to [her] or to others". *Garner*, 471 U.S. at 11.

The Ninth Circuit has also misapplied this Court's analysis in *Hope*, in an effort to avoid *Anderson v. Creighton's* requirement that the:

> "[R]ight the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant,

[9] Three years after *Garner*, was decided, the Washington Supreme Court identified Wash. Rev. Code § 9A.16.04 and Wash. Rev. Code § 10.31.050 as statutes that served as clear examples of the use of "lawful authority" ("A casual perusal of our state's written laws reveals several instances in which an individual lawfully may threaten injury to another. The Court of Appeals notes the most obvious-- a police officer apprehending a dangerous criminal. *State v. Smith*, 48 Wn. App. 33, 36, 737 P.2d 723 (1987). The officer's authority to shout "stop, or I'll shoot" derives from his power to "use all necessary means to effect [an] arrest", including force. Wash. Rev. Code § 10.31.050, *see also* Wash. Rev. Code § 9A.16.020(1); Wash. Rev. Code § 9A.16.040.")

> sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640.

In *Hope*, this Court discussed in detail its holding in *United States v. Lanier*, 520 U.S. 259 (1997), and the circumstances under which general statements of the law are sufficient to give a state official fair and clear warning that her actions will be unlawful. But, as part of its discussion this court also acknowledged:

> "In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary." *Hope*, 536 U.S. at 740-41 (citing *Anderson*, 483 U.S. at 640 and *Lanier*, 520 U.S. at 270-71).

Garner is precisely the sort of case identified by this Court in *Hope* as requiring a precedent with a very high degree of factual particularity. In *Garner*, this Court held that the Tennessee statute authorizing the use of deadly force in pursuit of a fleeing felon was not unconstitutional on its face, but was unconstitutional as applied to the particularly callous circumstances of that case. Under this Court's analysis in *Hope*, the Ninth Circuit should not have been able to rely upon the general constitutional rule articulated in *Garner* and *Graham* to conclude that Officer Brosseau had received fair and clear warning that her use of deadly force in pursuit of a disturbed, determined, dangerous felon would be a violation of his Fourth Amendment Rights. Given that she was acting under

a state statute, and a common law rule, understood, after *Garner*, to have been constitutional on its face, a precedent with a high degree of factual particularity would have been required to give her fair warning that her conduct would be unlawful. The cases discussed in detail in Officer Brosseau's Petition for Certiorari and in the dissenting opinion of Judge Gould - including *Scott v. Clay County*, 205 F.3d 867, 877 (6th Cir. 2000), *Smith v. Freland*, 954 F.2d 343, 347-48 (6th Cir. 1992), and *Cole v. Bone*, 993 F.2d 1328, 1330-33 (8th Cir. 1993) – ably demonstrate that that no precedent with the appropriate level of particularity exists.

The Ninth Circuit's determination that Brosseau was not entitled to qualified immunity is also problematic because the Fourth Amendment analysis that is required entails a balancing test. The Seventh Circuit has held that absent a closely corresponding factual and legal precedent, a court cannot conclude that a right is "clearly established" if the "existence of the right or the degree of protection it warrants in a particular context is subject to a balancing test". *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir. 1986), *overruled on other grounds by* Fed. R. Civ. P. 50 (1991 Amendments). *See also Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987), *overruled on other grounds by Burns v. Reed*, 500 U.S. 478 (1991) (relying on *Allphin* to conclude that "[w]here the state asserts a compelling interest for intruding into the plaintiff's privacy, the balance may weigh against protection of the right, and the intrusion may be justified"); *Baker v. Racansky*, 887 F.2d 183, 187 (9th Cir. 1989) (upholding a claim of qualified immunity for social workers who had taken a child into protective custody after noting that the case

"involve[d] the difficult balancing of a family's right to autonomy against the state's interest in protecting minor children from abuse"); *Moran v. Washington*, 147 F.3d 839, 847 (9th Cir. 1998) ("Because the underlying determination pursuant to *Pickering* whether a public employee's speech is constitutionally protected turns on a context-intensive, case-by-case balancing analysis, the law regarding such claims will rarely, if ever, be sufficiently 'clearly established' to preclude qualified immunity under *Harlow* and its progeny" [citations omitted]).

The present case, like *Allphin*, requires a balancing of Mr. Haugen's right to life against the State's interest in protecting its citizens and law enforcement officers from a visibly disturbed felon who had told the officer pursuing him that the only way to prevent him from escaping would be to shoot him. Absent a clearly comparable factual precedent, the Ninth Circuit should not have been able to find that Mr. Haugen's constitutional right was clearly established at the time Officer Brosseau acted.

The Ninth Circuit's misapplication of *Hope* to the clearly articulated principles of *Saucier* and *Anderson* demonstrates that additional clarification of the term "clearly established" is required from this Court. Under the particular circumstances of this case, general Fourth Amendment principles were insufficient to provide Officer Brosseau with full and fair warning that her actions were unconstitutional. Amici request that this Court accept the Officer Brosseau's petition in order to clarify the level of factual particularity required, in a case of this kind, for a finding that a constitutional principle, is "clearly established".

The Amici States submit that, without question, Officer Brosseau reasonably determined that Respondent Kenneth Haugen, in his violent and out-of-control effort to escape in a 3,000-pound Jeep Cherokee, posed a threat of serious physical harm to the officers, bystanders, and others in the Puyallup neighborhood. For this reason, the Amici States urge this Court's review of the Ninth Circuit's ruling that Officer Brosseau's difficult decision in this case somehow presents a violation of constitutional rights for which qualified immunity is not available.

CONCLUSION

For the foregoing reasons, the amici respectfully request that this Court grant the petition for a writ of certiorari filed by Rochelle Brosseau.

Respectfully submitted.

CHRISTINE O. GREGOIRE
Attorney General

Talis Abolins*
Catherine Hendricks
Assistant Attorneys General
P.O. Box 40126
Olympia, WA 98504-0126
(360) 459-6600

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**Counsel of Record*